

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**





77-6049

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 77-6049

COUNTY OF SUFFOLK, et al.,

Appellees,

against

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.

THE NATURAL RESOURCES DEFENSE COUNCIL, INC.

Appellees,

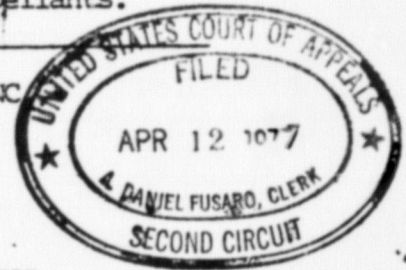
against

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.



BRIEF OF AMICUS CURIAE TRI-COUNTY COMMITTEE

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#### PRELIMINARY STATEMENT

This brief is being submitted by the Tri-County Committee to Control Offshore Development (hereafter TCC). The TCC is composed of the elected representatives of the County Boards of Freeholders and Planning Boards of Cape May, Atlantic and Ocean Counties in New Jersey. These three counties collectively account for nearly all of the coastal zone immediately adjacent to the area of OCS Sale No. 40.

This amicus brief is offered by the TCC to address certain significant aspects of the opinion of the court below which might not be raised by other parties. The inadequacies of the Sale 40 Environmental Impact Statement (hereafter Sale 40 EIS) which formed the significant basis of the decision of the court below are of central concern to the TCC. The exercise of TCC regulatory powers in response to inadequate National Environmental Policy Act (hereafter NEPA) documents, 42 U.S.C. §4321 et. seq., and inadequate safeguards can cause serious environmental impacts which were not evaluated in the NEPA documents on Sale 40. NEPA required a detailed statement on the environmental impact of the proposed action and calls for measures to mitigate that impact.

On the one hand, the TCC region could be irreparably harmed both environmentally and economically were the sale to be predicated on the inadequate NEPA documents. On the other hand, the exercise of TCC's regulatory powers in response to the inadequate NEPA documents and inadequate safeguards resulting therefrom can cause irreversible environmental impacts which were not evaluated in the NEPA documents. The Sale 40 EIS was also deficient in failing to analyze the impacts of specific probable onshore pipeline routes which the administrative record reveals TCC has long opposed. There

is an absence of any extant legal authority in New Jersey to alienate rights in the seabed of its jurisdiction. The lack of such a legal mechanism is of seminal importance to any Sale 40 EIS. No awareness of the fact is reflected in the pertinent Sale 40 documents and the long term implications of this fact remain uncalculated.

In summary this brief urges the Court of Appeals to affirm the ruling of the lower court dated February 17, 1977 which voided the Sale 40 leases for substantial violations of NEPA.



ISSUES PRESENTED FOR REVIEW

1) Whether the Secretary ignored the practical effects of local government licensing, permitting and review powers in the NEPA documents and thereby violated NEPA?

2) Whether NEPA was violated by the governments failure to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the DOI?

3) Whether the remedy in the order of the court below issuing a mandatory injunction and voiding the leases was proper?

#### STATEMENT OF THE CASE

This litigation was commenced in February, 1975 by the New York Counties of Nassau and Suffolk and several other local governments in those counties upon the filing of a complaint seeking to enjoin the Secretary of the Interior from proceeding with any aspect of the National Accelerated Outer Continental Shelf Leasing Program and OCS Sale No. 40.

Among the various Federal Statutes alleged to have been violated and the grounds upon which these plaintiffs sought relief were the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, the Coastal Zone Management Act, 16 U.S.C. §1451 et. seq., and the Outer Continental Shelf Lands Act (OCS LA), 43 U.S.C. §1331 et. seq.

On June 29, 1976 the State of New York and the Natural Resources Defense Council, Incorporated (hereafter NRDC) filed a complaint against the Secretary of the Interior seeking injunctive relief against the National Accelerated OCS Leasing Program and against OCS Sale 40. The two actions were consolidated for purposes of discovery and trial.

On June 30, at a preliminary hearing before the District Court, the government announced its intention to hold OCS Sale 40 on August 17, 1976.

On July 15, 1976 the NY/NRDC plaintiffs filed a motion for preliminary injunction against the Secretary of the Interior seeking to enjoin the National Accelerated OCS Leasing Program and OCS Sale No. 40.

On July 20, 1976, the New York Gas Group and the National Ocean Industries Association (hereafter NOIA) intervened as defendants.

On August 2, 1976, the planning directors of the New Jersey Counties of Cape May and Ocean, representing the TOC, testified for the plaintiffs in



the evidentiary hearings before the lower court. The Atlantic County Planning Director concurred with and participated in the development of the TCC position as presented in testimony by the other two counties.\* Evidentiary hearings commenced on July 23 and consumed three weeks. On August 13, 1976, the District Court judge issued a preliminary injunction against Lease Sale No. 40.

On August 16, 1976, this Court upon motions from appellants and intervenors, stayed the enforcement of the order granting the preliminary injunction. The Court held that the event of the lease sale "in and of itself" would not cause irreparable injury. The appellate tribunal warned that any leases entered into as a result of the sale would be terminable by the Court, since they all would be entered into with full knowledge of the parties to the leases of the pendency of the matter then before the Court.

On August 17, 1976 Mr. Justice Marshall declined to overturn the Court of Appeals stay. Focusing the stay on extremely narrow grounds, he warned of the real possibility that the lease could be invalidated should plaintiffs prevail on the merits by demonstrating NEPA violations:

The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. (emphasis added) I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an 'irreversible commitment of resources,' Natural Resources Defense Council v. NRC, 539 F.2d 824 at 844 (2 Cir. 1976), a citizen's right to have environmental

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This testimony was substantially a restatement of the TCC counties opposition to OCS Sale 40 as presented at the public hearings conducted by the DOI on the various NEPA documents.

factors taken into account by the decisionmaker would be irreparably impaired. For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements. Indeed this past Term, in Kleppe v. Sierra Club, . . . we indicated that it would have been appropriate for the Court of Appeals to have enjoined the approval of mining plans had that court concluded that 'the impact statement covering [the mining plans] inadequately analyzed the environmental impacts of, and the alternatives to, their approval.'

U.S., at \_\_\_\_ n. 16, 96 S. Ct., at 2729.

In the instant case, however, the Court of Appeals apparently decided that the opening of bids does not constitute an 'irreversible commitment of resources.' (emphasis added)

I am unprepared to say that the court was wrong in so holding. In the first instance, it is quite clear that the actual opening of the bids does not involve a commitment of any kind, since the Secretary reserves the right to reject all bids. Thus it is not until a bid is accepted -- which may not happen for 30 days -- that an irreversible commitment is even arguably made. Moreover, even after the bids are accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of NEPA.

N.Y., Natural Resources Defense Council, Inc. v. Kleppe, \_\_\_\_\_, \_\_\_\_\_, 97 S.Ct. 4, 7 (1976) (footnotes omitted) (emphasis added).



The Secretary proceeded to lease a total of 93 tracts in the Sale 40 area. He accepted bids totalling over 1.1 billion dollars. After the leases were signed the successful bidders immediately began to take preliminary steps required for full exploitation of their leaseholds.

Briefs of all parties\* and the record of the proceedings before Judge Weinstein were presented to this Court. On October 14, 1976 the Court of Appeals held that plaintiffs had not demonstrated that they would suffer irreparable harm between the date of the preliminary hearing and the trial, and that there was some question whether plaintiffs would succeed on the merits at the trial. The parties were advised that, by proceeding with leasing prior to a final determination, they assumed the risk of an ultimate adverse decision.

A hearing on the merits was held before Judge Weinstein producing a substantial record of testimony and documents. The TCC was granted leave to file Amicus brief in the proceedings before the district court.

On February 17, 1977 that court found five substantial violations of NEPA by the Secretary of the Interior. He enjoined the parties from "proceeding with the exercise of any powers purportedly granted by Sale 40 leases executed by the defendant" and declared the leases to be "null and void." (Weinstein, J. opinion at p. 96)\*\*

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\*The Tri-County Committee filed an Amicus Curiae brief in the Second Circuit on September 23, 1976

\*\*All references to the opinion of the lower court will be the opinion rendered on Feb. 17, 1977. References to that court's opinion on the preliminary injunction will be so identified.



FACTS RELEVANT TO THE ISSUE  
PRESENTED FOR REVIEW

A. INTRODUCTION

The Long Island and NY/NRDC plaintiffs sought to enjoin OCS Sale No. 40 on the grounds that the OCS Sale 40 Environmental Impact Statement (hereafter Sale 40 EIS) prepared for this sale by the Department of the Interior (DOI), was inadequate and defective in law. At the preliminary hearing, plaintiffs' witnesses testified to various inadequacies of the Sale 40 EIS in its consideration of possible dangers to environmental resources (T 935 & 1155)\*, in its consideration of the onshore impacts of federally sanctioned offshore development (T 529) and in its consideration of safeguards attached to the Leases as conditions of the Sale (T 1569 & 1610).

During the administrative process in connection with both the accelerated leasing program and OCS Sale No. 40, and before the District Court, representatives of local and county governments from the TCC region asserted that (a) onshore development must be consistent with State, regional and local plans and ordinances, much of which bar pipelines and other oil related development, and (b) that a best available technology clause, oil spill provisions and other protective stipulations must be added to the Stipulations of OCS Sale No. 40, as was done for OCS Sale No. 35, and (c) that the TCC was ready and willing to pursue those administrative, legislative, and legal remedies to accomplish these objectives.

Section 102(2)(c) of NEPA requires all agencies of the Federal Government to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the

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\*References to the preliminary hearing transcript are cited at (T # ).  
Reference to the final hearing transcript are cited at (FT # ).

quality of the human environment, a detailed statement by the responsible official on, inter alia, the environmental impacts of the proposed actions and alternatives to the proposed action.

The Office of Management and Budget Circular A-95, establishes a system of State and Areawide Clearinghouses (Atlantic, Cape May and Ocean County Planning Boards have been so designated) for the purpose of assuring maximum consistency of federal and federally assisted projects with State, areawide and local comprehensive plans and to assist Federal Agencies administering such programs in determining whether the project is in accord with the applicable Federal law. (Fed. Reg. Vol. 41, No. 8 at 2053) (emphasis added) Department of the Interior Final Directives issued as Part 511, Chapter 1 through 6 of the Department of Interior Manual, became effective on April 29, 1976. Among other general and program legislation which requires the Department to work with State and local governments Chapter 1 lists:

National Environmental Policy Act, 83 Stat 852; 42 USC 4321  
Federal Water Pollution Control Act, 86 Stat 816; 33 USC 1151  
Outer Continental Shelf Lands Act, 67 Stat 462; 43 USC 1331-43  
Coastal Zone Management Act, 86 Stat 1280; 16 USC 1451

Chapter 3 states in part at 511.3.1:

The purpose of this chapter is to: (B) provide bureaus with information on the relationships of proposed direct Federal development projects, leases, licenses, permits and related activities to State, areawide, and local plans and programs and to assure the maximum feasible consistency of Federal development with State, areawide and local plans and programs. (emphasis added)



and at 511.3.4:

Federal-wide procedure calls for (B) Assuring that the proposed action is consistent or compatible with State, areawide and local plans and programs identified in the course of such consultations. (emphasis added)

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 provides at Section (a) (1):

...The Secretary may at any time prescribe and amend such rules as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights, therein, and, notwithstanding and other provisions herein, such rules and regulations shall apply to all Operations conducted under a lease issued or maintained under the provisions of this Act.

and at Section (a) (2):

...The issuance and continuance in effect if any lease, or if any extension, renewal, or replacement of any lease under the provisions of this Act

shall be conditioned upon compliance with the regulations issued under this Act and in force and effect on the date of issuance of the lease. . . (emphasis added)

and at Section (b) (1):

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of this lease, or of the regulations issued under this Act and in force and effect on the date of issuance of the lease, . . . such lease may be cancelled by the Secretary. (emphasis added)

and at Section (b) (2):

Whenever the owner of a producing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act and in force and effect on the date of issuance of the lease. . . such lease may be forfeited and cancelled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 4(b) of this Act. (emphasis added)



and at Section 1337 (b) (4):

An oil and gas lease issued by the Secretary pursuant to this section shall contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease. (emphasis added)

The Form of Lease (Form 330-1, May 1976) being used for OCS Sale No. 40 states:

Section 10. Remedies in Case of Default. (a) Whenever the Lessee fails to comply with any of the provisions of the Act, or of this lease, or of the regulations issued under the Act and in force and effect on the effective date of this lease, the lease shall be subject to cancellation in accordance with the provisions of Section 5(b) of the Act: . . . (emphasis added)

(b) Whenever the lessee fails to comply with any of the provisions of the Act, or of this lease, or of any regulations promulgated by the Secretary under the Act, the Lessor may exercise any legal or equitable remedy or remedies which the lessor may have, including appropriate action under the penalty provisions of Section 5(a) (2) of the Act; however (emphasis original) the remedy of cancellation of the lease may be exercised only under the provisions of Section 5(b) and Section 8(i) of the Act.

In the promulgation of Section 250.34 CFR, "Drilling and Development Programs", reprinted on pages 784-788 of the FEIS for OCS Sale No. 40, the Secretary was careful to point out that "leases may be cancelled for failure to comply with 'regulations issued under this Act and in force and effect on the date of issuance of the lease.'" (emphasis added).

The new Secretary of the Interior, Cecil Andrus, has announced his intention to prepare an additional environmental impact statement on the impact of onshore development in the event that Judge Weinstein's decision is not affirmed. It is clear in light of Section 1334(b) (1) and (b) (2)

of the Outer Continental Shelf Lands Act, cited above, that any violation of regulations not "in force and effect on the date of issuance of the leases" are not grounds for cancellation.

B. THE TCC AREA AND THE PIPELINE

According to the 1970 census approximately 40 million people live within 150 miles of the New Jersey shore. As indicated in the 40 EIS (II-293) "virtually all" of New Jersey's coast is used for recreation and tourism. Tourism is New Jersey's number two industry. This shoreline has served human recreational needs for nearly a century. The entire city of Cape May, the nation's oldest seashore resort, has been designated a national landmark. The winter in Cape May City finds 4700 residents. In the summer there are 47,000 residents. (FT 139) In Wildwood, 4100 residents live year-round while 125,000 inhabit the city in the summer. (FT-162)

With the work week shortening, longer paid vacations and the obvious and growing need for the human to recreate and relax from harmful levels of stress, the seashore of New Jersey will serve ever so much more the needs of the megalopolis surrounding it. The Garden State greatly relies upon tourism for its economic and social survival. The shore communities rely absolutely.

Each witness who testified from the TCC area indicated that an oil spill could devastate their natural resources causing loss of jobs and revenues, devaluation of property and diminishing the quality of life. (FT 93, 113, 155-156, 172, 203) The clamming and fishing industries are significant and extremely vulnerable. (FT 197 & 203)



The Department of the Interior EIS for Deepwater Ports (Vol. 1, page IV at 75-82) analyzed a hypothetical oil spill on the Delaware Off-shore Region which indicates the potential magnitude of this environmental impact. This analysis concluded that such a spill "could completely cover the shore from just above Chesapeake Bay to the entrance of the New York harbor" (DOI-FEIS on Deepwater Ports, supra at 80) and inflict a total potential loss of \$2,800,000,000 in just one tourist season of which \$2 billion would be sustained by the State of New Jersey along (DOI-FEIS on Deepwater Ports, supra at 82).

The affects of this disaster are further exacerbated when considering the following facts. In Cape May County the 2/3 of the land is below a 10' contour making any attempts to cleanup an oil spill along the shore or on the land extremely difficult if not impossible. (TR 79) The testimony of Elwood Jarmer, Director of the Cape May County Planning Board further indicates the problems that county would endure by indicating that one-third of the county is delicate and irretrievable wetlands. (TR 78)

#### C. POWERS OF SHORE COMMUNITIES

Before reviewing the very real powers of municipalities to unalterably oppose pipelines, it is a striking reality that these towns and counties which have so much to lose do not oppose OCS development so long as it is done properly with timely and meaningful environmental evaluations. (FT 111-112)

The licensing capacity of the State of New Jersey is not vested in any singular unit of government. A vast panoply of levels of government are authorized to approve or disapprove segments of requisite permits.



State, counties and localities have substantial police power to affect and control land use decisions through their licensing, permitting and review functions. Consequently, an application filed in New Jersey by an OCS operator to construct onshore facilities could require a multitude of permits from those three levels of government.

The Sale 40 EIS assumed pipelines would be used and that oil would be refined at existing refinery centers including the Delaware River Basin, the largest in the northeast. Pipelines from the Sale 40 area to the Philadelphia area would necessarily have to cross the political jurisdictions of several New Jersey counties and tens of municipalities which exercise zoning permitting authority. Such zoning in New Jersey is permissive, that is, a use is allowed where specified by ordinance. Uses not specifically allowed are prohibited. Most local ordinances either prohibit pipelines or do not affirm their allowance. (FT 116) Nearly 75% of the seashore is publicly owned in New Jersey. (Sale 40 EIS Vol. p. 426)

The sanctity of the environment to these local communities has resulted in the enactment of ordinances prohibiting pipelines. Each of the 16 municipalities of Cape May has a zoning ordinance none of which presently permit pipelines. (FT 85) There was testimony that there is no place within that county where a beachfront pipeline could enter without interfering with the protection and development of the beach or wetlands. (FT 82 to 84) It was also pointed out that the Cape May County Planning Board was opposed to pipelines across the county and that there has always been opposition to such intrusions. (FT 113) Such opposition was voiced at the final hearing by representatives of Atlantic and Ocean Counties as well. (FT 167 & 198)

The witnesses, in short, demonstrated a solid phalanx of restrictive community zoning ordinances requiring variances for pipelines and other oil related facilities. County planning restrictions already exist from Sandy Hook to Cape May, in addition to a second tier of controls through the states Wetlands Act, Riparian Laws and Coastal Area Facility Review Act (hereafter CAFRA).

D. STATE REGULATORY POWERS OVER PIPELINES

CAFRA N.J.S.A. 13:19-1 et. seq. recognized the "serious adverse effects" the economy of the coastal area "will suffer" if the future location of major facilities is not carefully assessed. This vital law declared that the coastal region must be recognized as an extremely delicate region to be planned carefully "in the best long-term, social, economic, aesthetic and recreational interests of all the people of the State." N.J.S.A. 13:19-1. CAFRA specifically defined "facilities" to be reviewed to include pipelines N.J.S.A. 13:19-3(c). CAFRA provided the state with a major coastal planning tool. The legislature called for the development of a long range plan to be completed by the State Department of Environmental Protection (hereafter DEP) by a certain date, N.J.S.A. 13:19-16. An inventory of the coastal area delineated within the law itself, has already been completed to aid in the development of the coastal plan. It further established an application process for permits to construct certain facilities within a delineated coastal area. (N.J.S.A. 13:19-6 to 15) The statute clearly preserves for the municipalities their power to exercise zoning authority independent of permit applications before the state agency. N.J.S.A. 13:19-19.



"The provisions of this Act shall not be regarded as to be in derogation of any powers now existing and shall be regarded as supplemental and in addition to powers conferred by other laws including municipal zoning authority." Section 19 of CAFRA.

It is to this state statute, i.e., CAFRA, that New Jersey's Governor Brendon Byrne referred when he addressed the DOI's hearings on OCS Sale-40. This testimony, cited by the court below, reflects a clear effort by this state to indicate New Jersey's concern for the yet unresolved onshore problems.

The only state statute addressed to the laying of pipes under tidal waters specifically limits its provisions to tidal lands other than those under the waters of the Atlantic Ocean. See N.J.S.A. 12:3-26 reads .

Laying pipes under tidal waters; consent of governor and board required

It shall be unlawful for any person or corporation to lay any pipe or pipes on any of the lands of the state lying under tidal waters without the consent or permission of the governor and the board first had and obtained in writing; provided, that nothing in this section contained shall be construed to apply to lands under the waters of the Atlantic ocean.

The above riparian statute is part of New Jersey's riparian law. Generally, the riparian laws in this State have not changed much since the turn of the century. Most amendments have been focused upon the restructuring of the regulatory agency or authority responsible for the issuances of said grants or licenses. See N.J.S.A. 13:1B-13, N.J.S.A. 13:1D-3. Currently it is the Natural Resource Council (NRC) in the DEP which must decide whether an application for a grant of these unique riparian resources is in the public interest. See Bailey v.

Driscoll, 34 N.J. Super. 228 (1955).

The authority and responsibilities of the Council must be made clear for there to be a full comprehension of one additional forum where opposition to pipelines might be voiced by citizens, municipalities or other state agencies. The NRC would have to pass judgment on an application to lay a pipeline.

N.J.S.A. 13:1B-13 et seq. sets forth certain guidelines which have been observed by the NRC for determining whether the public interest is served and whether a riparian permit, lease or license shall issue. In pertinent part the law states:

The Council shall, subject to the provisions of applicable law, approve an application for lease, conveyance, license or permit, if . . . it is satisfied that the lease, conveyance, license or permit, will be in the public interest. In determining whether a lease, conveyance, license or permit is in the public interest, the council shall consider the environmental impact of the use proposed to be made of the property in question. . . . The council and the appropriate state officers shall require such terms and conditions as it deems necessary and appropriate.

The counties in New Jersey also have responsibility to review and approve or disapprove development proposals along county roads or affecting county roads. The criterion are established in site plan-subdivision regulations and county comprehensive planning.

The denial of any one of the many permits mentioned above would result in the applicant having to seek other alternatives, possibly including admitted environmentally degrading alternatives such as tankering of offshore oil and gas processing. Judge Weinstein focused on the environmental effects of a State decision to ban pipelines. He considered the failure of the Sale 40 EIS to address this issue a violation



of NEPA sufficient to issue a permanent injunction and declare the OCS Lease sale null and void. The Sale 40 EIS in several locations states that the actions of State and local governments could substantially affect the viability of the assumption that pipelines would be used to transport oil produced by OCS Sale No. 40 to shore, and that if pipelines are not viable, because of State or local action, tankers may have to be used to transport the oil. (Sale 40 EIS Vol. I at 15, 40, 50, 59; Vol. II, at 30-32 & 428-429)

The director of the Geological Survey, Department of Interior, has characterized the Sale 40 EIS sketch of world wide tanker accidents at 40 EIS Vol. II 30-32, as "so misleading and inaccurate that we suggest it be deleted" (Sale 40 EIS Vol. III at 162). No detailed statement as to the environmental impact of using tankers to transport oil from OCS Sale No. 40 to shore has been done by DOI.

## LEGAL ARGUMENT

Point I    The Impact Statements for OCS Sale 40  
             Do Not Satisfy the Requirements of the  
             National Environmental Policy Act

### Summary of Legal Argument

1)    The NEPA decision by the Secretary of the Interior to lease ocean waters for oil and gas exploration and development requires a thorough environmental analysis providing sufficient information enabling him to make an informed decision.

2)    The framework within which such an analysis should be conducted must be designed appropriately to address fully every relevant environmental consideration and assumption likely to affect the particular lease sale. There can be no pro forma approach.

3)    In its requirement of a detailed statement a thorough discussion of NEPA mandates rigorous resting of assumptions, material to the proposed federal action.

4)    Where local and state powers exist to restrict and reject the use of pipelines, and where local opposition is absolutely advanced, the assumption that pipelines would be used within those jurisdictions must be totally evaluated. For the Secretary to make an informed decision and institute appropriate mitigating measures he must meaningfully consider the full impacts of alternative transportation methods and be aware of the probable environmental impacts of the project.

5)    While the Sale 40 EIS recognized the existence of state and local land use powers that does not satisfy NEPA. The very likely exercise of these powers and not simply the mere existence of them is in need of environmental evaluation.



#### INTRODUCTION

In finding that the Secretary violated NEPA and in entering a permanent injunction against Sale 40, the Court below did not abuse its discretion nor make a clear mistake of law.

By the Secretary's failure to prepare an adequate and detailed statement, he not only violated NEPA, he also has failed to fathom the present and future value of the vast economic and environmental resources of coastal New Jersey. Ignorance of those significant resources, in turn, lead to the Secretary's failure to provide adequate safeguards and to conduct the Sale in a manner consistent with the intent of NEPA. By his failure to recognize and fully analyze the environmental impacts of OCS induced onshore facilities and by his failure to protect those significant resources, the Secretary has solidified the local opposition to Sale 40. Such opposition was stated by spokesmen of local government in New Jersey as early as the public hearing on the Programmatic EIS. (hereafter PEIS)

Even if, the Secretary should now seek to mitigate onshore impacts he could not do so. Due to constraints imposed by the OCS Land Act, the administrative defects of the Sale, including the inadequate lease stipulations, cannot be remedied without voiding the leases.

The remedy is proper. NEPA has been substantively violated, an irreversible commitment of resources has been made and a citizen's right to have environmental factors taken into account has been irreparably impaired. Without nullifying the leases, the TCC amici have no other recourse at law.

A. The Failure of the Sale 40 EIS To Analyze The  
Practical Effects of Local Governmental  
Licensing, Permitting and Review Powers Violates NEPA

The Courts have repeatedly affirmed the NEPA mandated requirements of an impact statement. NEPA mandates that "every relevant environmental effect of the project (must) be given adequate consideration" Save Our Ten Acres v. Kreger, 472 F2d 463 at 467 (5th Cir. 1973) in a statement which is "detailed" and "thorough" and is designed to fully inform the responsible official. NRDC v. Calloway, 524 F2d 92 (2nd Cir. 1975) To completely fulfill his NEPA obligations the responsible official, in this case the Secretary of the Interior, can not indulge in "speculation and conjecture when information sources and analytical tools are available." Sierra Club v. Coleman, 9 ERC 1314 (D.D.C. Sept. 23, 1976), appeal docketed, No. 76-2158, D.C. Cir. Nov. 19, 1976. It is important that any decision based on a NEPA impact statement must be made knowingly and with due regard for its consequences. Sierra Club, supra at 1317. NEPA is thus an "environmental full disclosure law" aimed at the large-scale federally initiated actions and will not tolerate "vague generalities or pious self-serving resolutions" and resolutions which assume "that someone else [i.e. state and local governments] "will take care of" potential problems. Chelsea Neighborhood Assoc. v. U.S. Postal Service, 516 F2d 378 (2nd Cir. 1975). The lack of adequate consideration given to the environmental impact of state and local actions does not meet the standards established by the courts.

The Sale 40 EIS is purported to be a site specific EIS, its purpose to fully discuss the actual effects of the project on the impacted area. In New Jersey a site specific evaluation must take into account the fact that



states, counties and localities have substantial police power to control and affect land use decisions through their licensing, permitting and review functions. In New Jersey, an application by an OCS operator to construct onshore facilities could require a multitude of permits from those three levels of government. The Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., Coastal Wetlands Act, N.J.S.A. 13:9A-1 et. seq., and various riparian acts among the relevant State statutes discussed earlier. New Jersey's counties review development proposals along county roads through their site plan-subdivision regulations and county comprehensive planning. The State and county levels also have review authority of federal projects through the Office of Management and Budget -95 review process which Department of the Interior has incorporated into its leasing program (Federal Register, Vol. 41, No. 41, page 8808). Localities exercise land use police power through their zoning and master planning functions. Most of the local governmental entities' zoning ordinances in the New Jersey coastal zone do not provide for the development of onshore OCS development.

The Court below found that:

"Evidence indicated that state or municipal decisions banning pipelines or ordering their special routing were probable given the substantial impact that construction of a pipeline, or oil spillage from it, would have on coastal lands. (Opinion p. 3)

Clearly, the record establishes that references and abstract listings of the powers of state and local authorities were contained in the NEPA documents. Yet, a "detailed statement" and analysis of the environmental impacts, such as, the use of tankers and longer, and more costly, pipelines resulting from the exercise of these powers was not analyzed as required by NEPA. The Court below properly asserted:

But passing references to, and abstract listings of, state and local authority is only the beginning and not the end of the NEPA required inquiry. The next, and by far more crucial step is a projection of the site-specific, pragmatic, empirical effects of the likely exercise of such power. It is the impact of local authority, not its mere existence, that must be studied and evaluated. (Opinion 19)

Outspoken opposition to the National Acceleration Leasing Program was voiced by TCC spokesmen as early as the public hearing on the PEIS.

"The landside impacts of Outer Continental Shelf development promise to be swift, irrevocable and potentially devastating to coastal resort areas. While we commend and applaud the efforts of the Interior Department (and other agencies) to regulate, administer and control the environmental impacts at Outer Continental Shelf drilling sites, efforts to minimize on-shore, so-called secondary impacts, should be pursued aggressively. In looking toward the sea, the Interior Department has turned its back on the land." (emphasis added)

At the public hearing on the so called "site specific" draft EIS for Sale 40 a representative of TCC commented:

Generally the Draft Environmental Impact Statement on the proposed OCS Sale Number 40 is a great improvement over the draft so-called "generic" statement on the proposed accelerating leasing program in toto. However, our two prime areas of concern, oil spillage and induced on-shore industrial development remain.

Tri-County planning directors, Jarner and Thomas, testified before the District Court on the NEPA necessity and environmental practicality of including proper safeguards as special lease stipulations for OCS Sale No. 40. (T 1569 and 1634). TCC is opposed to OCS Sale No. 40 in its present



form. Because of the existing structure of the leases, some of the southern New Jersey counties presently are fully prepared to prohibit onshore OCS development and pipelines. This is clear from the testimony of Jarmer and Thomas as cited in the recitation of facts above. (p14).

While the NEPA documents recognized the existence of local regulatory powers (licensing, permitting and review) the Sale 40 EIS failed to evaluate the exercise of those authorities in light of the strong statements of concern and dissatisfaction with the NEPA documents. The Sale 40 EIS briefly referenced the potential for exercising this authority at only one point and even then by relegating it to a footnote. (Sale 40 EIS Vol. II, p. 20 footnote) The failure by the DOI to analyze the environmental impact of the probable exercise of local powers thus swept significant environmental impacts under the rug. The ramifications of the incomplete impact statements are still unknown to the Secretary. To be sure, the testimony by a DOI employee, Ms. Gresham, indicated that in the tract selection process pipeline routes and impact of existing state and local laws on these routes as well as tanker use was not considered. (Ft. 758) Interiors simply assumed that pipelines would be economically feasible. (Ft. 767)

Because the NEPA documents reflect the economic feasibility of pipelines, the Sale 40 EIS assumes that pipelines will be used. Given the existence of state and local land use police powers and probable 'opposition' to OCS onshore facilities, the Secretary's assumption should have been tested.

To bring a Federal action into conformity with State, areawide and local comprehensive plans and programs and local use ordinances may involve

conditions and stipulations attached to permits and licenses required by State and local governments which might be unacceptable to the Sale 40 Lessees. Yet the environmental impact of Federal responses to the exercise of state and local government powers relative to OCS Sale No. 40 has not even been discussed in the Sale 40 EIS. The denial of any State or local pipeline permit could result in the lessee having to seek other alternatives, including, for example, the use of tankers. Yet the tanker oil spill analysis is admittedly deficient. (see facts p.18 ) (40 EIS Vol. II at 30-32) The tanker discussion failed to analyze the economic impact of an oil spill on the coastal environment of New Jersey.\* That the DOI had the capability to prepare such an analysis is demonstrated by the DOI impact statement on Deepwater Ports.

As indicated previously in the "Facts Relevant" (P. 18 ), the Director of the Geological Survey recommended the deletion of the so-called tanker analysis because it was "misleading and inaccurate".

Despite the expressions of total opposition toward the PEIS, that opposition was qualified by TCC representatives in policy statements on the Sale 40 Draft EIS.

At the public hearing on the Sale 40 Draft EIS TCC spokesmen urged the institution of adequate safeguards, such as special lease stipulations to conduct Sale 40. There, it was clearly stated that the receptivity of the TCC governments was contingent upon the provision of adequate safeguards and that the failure, by the DOI, to adequately protect the economic and

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\*It is important to a detailed Sale 40 EIS that the short term vs long term benefits of 1) the fishery/tourism industry operating without competition from OCS oil and gas benefits, 2) OCS oil and gas activities operating without competition from the fishery/tourism industries, and 3) simultaneous operating of (1) and (2) above, be compared. Indeed this very comparison was recommended to the DOI by the U.S. EPA with regard to OCS Sale 42 in a letter dated December 21, 1976.



environmental resources of the TCC region would result in unyielding opposition.

Fundamentally, the safeguards sought by TCC were similar to those contained as special lease stipulations for other Sales. (see fact p. 8 )\* The Sale 40 EIS documented the importance of the vast economic and environmental resources of coastal New Jersey. Ironically, the final Sale 40 Orders and special lease stipulations failed to implement safeguards to protect the wealth of resources. That failure solidified local opposition, which inevitably will lead to confrontations when local governments exercise their pervasive permitting authority\*\*. The ramifications of these confrontations would lead to the denial of necessary permits for onshore facilities, including pipelines, thereby raising the spectre of tankers. As indicated earlier, the discussion of tanker impacts remains inadequate carrying its own ominous implications. The Secretary knew full well from the administrative record the extent of specific local opposition. The scenario above makes real the impacts which the Court below properly recognized were violative of the NEPA requirement for a detailed statement. Had the Secretary considered the practical consequences of local opposition

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\*For example, Stipulations No. 2, 3, 7, 8 & 9 for OCS Sale 35, in southern California, required the use of the "best available technology." While the Sale 40 Draft EIS discussed the quality of technology to be required for Sale 40 and invited the reader to believe that the U. S. Geological Survey would require the "best practical operating equipment" and the "most effective available" pollution control equipment, the final OCS Orders and special lease stipulations failed to specify any quality of equipment. Despite the claim in the brief of the federal appellant-defendants, at p. 17, that OCS Order No. 7 requires the use of the "most effective available" technology, no such language is contained in the Final Orders Sale 40, Final Orders (Fed. Reg., Vol. 41, No. 134-July 12, 1976) pp. 2855-28564.

\*\*Local and state conditions attached to permits of their respective jurisdictions have caused OCS operators, as in southern California, to implement environmentally hazardous actions which have received the blessings of DOI. The Sale 40 EIS fails to explore this eventuality.

and its legal exercise he would have been capable of making a fully informed decision.\* His decision was not one that can be considered "informed" and thus NEPA was violated.



B. The District Court Properly Found A Substantial Violation of NEPA in the Secretary's Failure to Prepare An Analysis of Specific Probable Onshore Pipeline Routes

To begin with the statutes of New Jersey do not appear to provide any mechanism by which the State can lease or convey submerged lands seaward of what is commonly referred to as the exterior line or commissioner's line. The historical practice is that riparian grants along the Atlantic coast have been issued only to a distance of one thousand (1000) feet seaward of the mean water line. The significance of this fact cannot be underestimated since it is not clear whether the New Jersey Legislature ever contemplated or presently contemplates leasing or conveying those lands between this "line" and the three mile limit.

At any rate, the implications of this remain ominous. It is quite possible that in the absence of a method to convey the submerged lands needed for pipeline construction that these lands, would not be made available at all, again implicating the use of oil tankers. (FT 373-4)\* This is the singular most important failure of the Sale 40 EIS. Even assuming total receptivity of local government to onshore pipelines the absence of such authority is the fatal flaw in the Secretary's presumption that pipelines could cross into New Jersey. This then is the problem with the Sale 40 EIS concerning the laying of pipelines from oil rigs to the coast of New Jersey.

Onshore, the lower court's ruling properly called for the thorough evaluation of the secondary impacts of specific probable onshore pipeline routes in the site specific statement.\*\*It will become clear from what follows that the lease stipulations and safeguards relevant to onshore pipelines sought by the TCC must be finally addressed. The lower court properly

\*See Exhibits T-238 & T139.

\*\*See the Council on Environmental Quality Guidelines, which addressed the secondary impacts issue at §1500.8(a)(3)(ii) recognizing that secondary effects may often be more substantial than the primary effects of the action itself.

recognized that the safe introduction of onshore pipelines cannot be accomplished without evaluating local receptivity understandably contingent upon the recognition of a region's resources.

Despite suggestions by appellant-defendants that the District Court ruling would have the DOI analyze every individual zoning ordinance in the mid-Atlantic region to determine the acceptability of pipelines, that is simply not the case. NEPA does not require that the Secretary conduct a town by town survey to determine local opposition or receptivity to on-shore OCS development in every existent town. The lower court's decision is here instructive where he states that the deferral of selecting and analyzing specific pipeline routes:

Borders on irresponsibility in view of NEPA's explicit mandate that all potential environmental considerations be weighed prior to the decision to proceed with major federal programs. NEPA required the Secretary to explore the site-specific impacts of pipelines along definite routes, at least to the extent that such routes were ascertainable based on information available at the time. (emphasis added (p. 27))

It is clear that within the "rule of reason", NEPA required the Secretary to define specific probable pipeline routes wherein the affected municipalities would likely only accept a pipeline with adequate safeguards guaranteed. Assuming as we must that these towns would deny permits in the absence of such written guarantees and assuming the Secretary determined that such guarantees were too demanding, he would have had to seriously consider alternatives to pipelines. The Secretary would then have been compelled to conclude that the use of tankers must be evaluated.



A thorough analysis of tanker operations and their inherent impacts would then have been conducted and the dangers of tankers appreciated. Thus the environmental preference for pipelines would have been established requiring a refocus on the safeguards acceptable to the affected municipality. At that juncture, those adequate safeguards fully responsive to the protection of the economic and environmental resources of coastal New Jersey would be written into the lease provisions.

The importance of analyzing specific probable pipeline routes is clearly established in the Sale 40 EIS. (Vol. II - p. 290), "The general location of many of the facilities which would be required onshore as a result of the proposed sale would be a function of where pipelines are allowed to come ashore." (emphasis added) Thus pipeline routes are the key to the location of OCS onshore facilities and their impacts. The siting of pipeline terminals, oil storage tank farms, pumping stations, gas processing plants, oil refineries and petro chemical complexes is then intrinsically dependent upon pipeline routing. Yet, the siting of these facilities, which can have devastating socio-economic environmental impacts, are the basis of the concern and opposition of localities to the leasing program in general and to Sale 40 in particular, and their siting and impacts were not analyzed. By the Secretary's failure, or the failure of his agents, to fully analyze specific probable pipeline routes his decision to proceed with the Sale was made without the full knowledge of the specific impacts such facilities could have on specific probable sites. More importantly, however, his decision was made without an understanding of the impact local receptivity or rejection of such facilities could have on the leasing program and represents therefore a substantial violation of NEPA.

Point II    The District Court Properly Granted  
              The Permanent Injunction

The serious and substantive deficiencies of the Sale 40 NEPA documents and the Secretary's in consideration of environmental factors justify the issuance of a permanent injunction and the voiding of the Sale 40 leases.

Neither the issuance of the permanent injunction nor the voiding of the Sale 40 lease represent unusual remedies, as both are supported by sufficient case law. Where NEPA violations have been found, the Second Circuit has applied the remedy of injunction. NRDC v. Calloway, *supra*; Chelsea Neighborhood Association v. U. S. Postal Service, *supra*; Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972); Staubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975); Sierra Club v. Mason, 351 F. Supp. 419 (E.D. Conn. 1972).

The Second Circuit has accepted the fact that a project enjoined by the Court causing delay and increased expense nonetheless will require the issuance of an injunction and that "Congress has implicitly decided that these costs must be discounted" to assure compliance with NEPA. Staubing v. Brinegar, *supra*.

In Sierra Club v. Mason, *supra*, the District Court aptly stated, at p. 427:

...at a minimum it seems clear that in the absence of extraordinary equities on the government's side, the requirement of an impact statement must be enforced by an injunction whenever the proposed project poses a substantial risk of damage to the environment and there exists a reasonable possibility that adequate consideration of alternatives might disclose some realistic course of action with less risk of damage. Even if the responsible agency ultimately decides not to pursue such alternative course, the public disclosure of all the pertinent circumstances serves an important policy of the Act, and may well affect governmental decision-making in the future."



Equally significant was the holding in Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975) where the Court held at, p. 123:

.....the court should assess each situation on a case-by-case basis to determine the appropriate scope of relief. The burden, however, should be on the defendants to establish that the equities are 'clearly and strongly' in their favor if an injunction is to be denied. Conservation Society of Southern Vermont, supra, 508 F.2d at 935.

It is clear that the federal appellant has not satisfied that burden. The fact that leasing has taken place does not in any way mitigate against the issuance of the injunction. See Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1255 (10th Cir. 1973). A timely injunction insures that the affected parties will not unduly suffer either environmental or economic hardships. Further, the timeliness of the present injunction will preserve the opportunity for the Secretary to pursue appropriate alternatives less harmful to environment than the action currently contemplated in OCS Sale 40.

The consequences of issuing the injunction or voiding the leases will not be significant in final balance.

The opening pages of the Sale 40 EIS cite U. S. Geological Survey estimates which indicate the potentially "recoverable resources of the 154 tracts included in the proposed lease sale range from .4 to 1.4 billion barrels of oil...." The Federal Energy Administration estimated the total daily national consumption as June 1976 at 15.9 million barrels per day.\* This offers keen perspective in assessing the equities at issue here.

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\*This was not part of the record but may be found in the F.E.A. publication entitled - Monthly Energy Statement - February 1977 which contains at page 8 the 15.6 million barrels per day figure as the June '76 National rate of consumption. For the same period the Bureau of Mines in DOI referenced a 16.863 million barrel per day figure in their publication entitled Petroleum Statement, Monthly, June '76, - page 2.

Under the most fortuitous of circumstances, these resources offer no more than a sustained national supply of 88 days. Likewise, a minimal find would offer a 25 day supply. The lower Court's finding of injunctive relief is therefore appropriate given these facts.

According to the testimony of NOIA's witnesses, Mr. Bybee, the oil companies will not lose the value of their preliminary research (T. 1214). The equities, therefore, weigh heavily toward the public interest in obtaining compliance with NEPA and away from the short term profits of the oil companies who are not the objects of protection under the Act. Furthermore the far reaching consequences of not fully evaluating the impacts of OCS Sale 40, as described earlier, are the very impacts that necessitated NEPA's creation.

Certain aspects of the OCS Land Act further support the need and appropriateness of the injunction. In announcing his decision to appeal from the opinion of the Court below, the new Secretary also announced his intention to prepare a supplemental EIS "prior to approving development plans for the leases." (See brief of federal appellants at page 28.) Should future analysis of the environmental impacts of both the exercise of state and local powers, and environmental impacts of specific probable pipeline routes reveal the desirability of modifying the terms and conditions for the conduct of Sale 40 activities, such new terms would ultimately be unenforcable were the leases not voided at this time. The Department's ultimate authority to enforce lease terms and stipulations is the authority to cancel leases for violations of those conditions and stipulations. Yet OCS leases cannot be cancelled for violations of lease conditions, such as regulations and special lease stipulations, which are imposed after the leases



are in effect. 43 U.S.C. §1334 Section (a) (1) (2); Section (b) (1),  
(2); 1337 § (c) (4); Form of Lease (Form 330-1, May, 1976) Section 10  
(a) (b).

The Secretary cannot enforce regulations executed subsequent to the issuance of the lease regardless of the environmental necessity of any such regulation. Union Oil Co. v. Morton, 512 F. 2d 743, (9th Cir. 1975).

Such a constraint on the Secretary is violative of the entire purpose of NEPA, yet it is pervasively intrinsic in the whole OCS program. Certainly, NEPA neither contemplated nor authorized a major federal action to be commenced, its impacts be allowed to occur and, then later be analyzed and reconsidered. NEPA's function is to present a detailed statement to the responsible federal official, fully enumerating and analyzing the impacts of and alternatives to the action (including mitigating measures) so that the official can render a balanced and informed decision prior to taking any action.

Should such future analysis reveal the need for additional safeguards, such as, regulations or special lease stipulations, such safeguards would be ultimately unenforcible, unless the Sale 40 leases are voided at this time. Without such relief, amicus curiae would suffer irreparable and immediate harm and would have no other remedy at law.

In voiding the Sale 40 leases the Court below ordered the only proper and equitable remedy.

CONCLUSION

It is respectfully requested that:

- 1) The Order of the United States District Court granting a permanent injunction of OCS Sale 40 be affirmed.
- 2) The voiding of the Sale 40 leases be affirmed.
- 3) The Department of the Interior be directed to prepare and promulgate an EIS fully complying with the requirements of NEPA.
- 4) The special lease stipulations be revised and reformed to comply with NEPA.

Respectfully submitted,

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